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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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IN THE MATTER OF THE FORMAL COMPLAINT OF PAC-WEST TELECOMM SEEKING ENFORCEMENT OF THE INTERCONNECTION AGREEMENT BETWEEN PAC-WEST TELECOMM AND QWEST CORPORATION.	)	Docket No. T-01051B-05-0495 T-03693A-05-0495 **LEVEL 3 COMMUNICATIONS' COMMENTS REGARDING GLOBAL NAPS DECISION**

1. Introduction and Summary.

Level 3 Communications, LLC ("Level 3") respectfully submits its comments in support of the comments of Pac-West on the *Global NAPs* case.[1] Given the profound implications of the Commission's decision in this matter to Level 3 specifically and telecommunications competition in Arizona generally, Level 3 believes it is important and appropriate to make its views to the Commission known.

In short, as PacWest has stated in its Supplemental Brief, the *Global NAPs* decision has no effect on this Commissions ruling in the instant case, and Qwest's contrary arguments are simply wrong: (1) the First Circuit's ruling has no effect on the Commission's analysis in this

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[1] Formal Complaint of Pac-West Telecom Seeking Enforcement of the Interconnection Agreement between Pac-West Telecom and Qwest Corporation, *Procedural Order,* Docket No. T-010510B-05-0495; T-03693A-05-0495 (April 25, 2006) (*Procedural Order*).In its April 25, 2006 order, the Arizona Corporation Commission ("Commission") asked the parties to provide supplemental briefs regarding the First Circuit's opinion in *Global NAPs, Inc. v. Verizon New England, Inc.*, Case No. 05-2657, 2006 U.S. App. LEXIS 8805 (1st Cir. April 11, 2006) ("*Global NAPs*").

matter; and (2) to apply a different compensation scheme to different classes of ISP-bound traffic creates uncertainty, confusion and invites further litigation if not market disruption.[2]

The *Global NAPs* case arose out of an arbitration proceeding. The competing local exchange carrier ("CLEC") argued that the *ISP Remand Order* "preempted" Massachusetts regulators (the "DTE") from addressing any aspect of intercarrier compensation for ISP-bound calling. The DTE disagreed, and the 1st Circuit ultimately upheld the agency. It ruled that the FCC "did not expressly preempt state regulation" with respect to "non-local ISP-bound calls."[3] Since preemption of state authority requires clarity, the 1st Circuit could not conclude that the DTE was preempted. *Id.* at [*37]-[*38].

As described below, this ruling has no effect on the matter at hand for at least the following reasons. First, *Global NAPs* comes from the 1st Circuit, while this Commission's decisions under the Telecommunications Act of 1996 are reviewed by the 9th Circuit. This means that *Global NAPs* is, at most, interesting to consider. It is not binding. Second, *Global NAPs* arose in response to a claim, in an arbitration proceeding, that the state regulator literally had no legal power to address the issue, whereas this case involves the interpretation of an existing interconnection agreement that essentially requires this Commission address that question. Third, ***at most*** *Global NAPs* holds that it is ***permissible*** for a state regulator to take a

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[2] Following the issuance of the court's decision in *Global NAPs,* Verizon shut down interconnection circuits with Global NAPs, resulting in outages for hundreds of thousands of customers throughout Massachusetts. *See* "Verizon halts Internet service to Global NAPS -Verizon Communications Inc. is no longer providing Internet connection service to Global NAPS Inc., cutting off Web access to some Massachusetts residents" Bizjournals, 4/28/2006 *available at* http://www.bizjournals.com/ct/rc/30414/www.bizjournals.com/boston/stories/2006/04/24/daily81.html?from_rss=1; and http://www.cybertelecom.org/broadband/rcomp.htm.

[3] *Global NAPs,* 2006 U.S. App. LEXIS at [*3], finding that the *ISP Remand Order* was "unclear" on that issue. *Id.* at [*23].

narrow view of the *ISP Remand Order.*[4] Nothing in that order required the Massachusetts regulators – much less this Commission – to do so. Finally, *Global NAPs* does not address the underlying policy issue of how best to promote competition for dial-up Internet access and other IP-enabled services, such as Voice over Internet Protocol ("VoIP") services. Those policy considerations practically compel the conclusion that a broad rather than narrow reading of the *ISP Remand Order* is appropriate.

2. *Global NAPs* Is Not Binding On This Commission.

Under 47 U.S.C. §252(e)(6), review of this Commission's decisions is by the federal courts in Arizona, with appellate review by the 9th Circuit. This means that decisions by federal courts of appeals in other circuits are not binding here. Obviously, it is reasonable for this Commission to consider what courts in other circuits do. But first and foremost the Commission needs to look to what 9th Circuit precedent says about the issues before it. Only if the 9th Circuit has not spoken is it necessary for the Commission to consult cases from other circuits. In such cases, those decisions do not ***control*** this Commission's actions; they may, at most, ***inform*** those actions.

Qwest refers to the "binding authority" of the *Global NAPs* case (Qwest Brief at page 4). It apparently bases its claim of "binding" effect on the Supreme Court's decision in *Hillsborough County v. Automated Med. Labs. Inc.,* 471 U.S. 707 (1985). There the Supreme Court ruled that an agency seeking to preempt state authority must clearly indicate its intention to do so. Qwest's claim confuses the 1st Circuit with the Supreme Court, however. Obviously the ***Supreme Court's*** decision in *Hillsborough* – setting out the standard for determining when preemption has

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[4] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order,* 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded, WorldCom v. FCC,* 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003).

occurred – is binding law here. But the 1st Circuit's specific ***application*** of that standard to the *ISP Remand Order* is not binding. That is, the fact that the 1st Circuit looked at the *ISP Remand Order* and did not find enough clarity to warrant the conclusion that the FCC has preempted state authority does not mean that this Commission, or the 9th Circuit, is legally compelled to reach the same conclusion on that issue, or any other issue that the 1st Circuit may have addressed in *Global NAPs.*

Ultimately, Qwest's arguments regarding the "binding" effect of *Global NAPs* boil down to claims that the 1st Circuit properly applied *Hillsborough* to the *ISP Remand Order.* Level 3 submits that this Commission (and, if the matter goes to court, ultimately, the 9th Circuit) gets to decide whether it did or whether it didn't. Either way, *Global NAPs* is not "binding." It's just a case from another judicial circuit that might or might not be relevant here.[5]

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[5] In some respects, Level 3 believes that it would be legal error to follow *Global NAPs* too closely here, because it appears that the 9th Circuit and the 1st Circuit indeed take different views of what the *ISP Remand Order* did and – equally important – what it means that the D.C. Circuit found certain arguments relied upon in the *ISP Remand Order* to be "precluded.". In *Pacific Bell v. Pac-West Telecomm,* 325 F.3d 1114 (9th Cir. 2003), the 9th Circuit recognized that the *ISP Remand Order* "abandoned the distinction between local and interstate traffic as the basis for determining whether reciprocal compensation provisions in interconnection agreements apply to ISP-bound traffic." *Id.* at 1130-31. The 1st Circuit's ruling (and the DTE's actions) are hard to explain if, as the 9th Circuit held, that there is no distinction "between local and interstate traffic" for these purposes. Moreover, the 1st Circuit repeatedly relied on the fact that the Communications Act preserves state authority over intrastate access charges. *Global NAPs, passim* (characterizing the issue as whether the FCC has preempted state authority over intrastate access charges). But the only statutory provision that preserves such authority is 47 U.S.C. § 251(g), on which the FCC relied in the *ISP Remand Order.* Here the 9th and 1st Circuits completely diverge. *Pac-West* notes that, while the D.C. Circuit did not vacate the *ISP Remand Order,* it held that reliance on Section 251(g) was "precluded." *Pac-West,* 325 F.3d at 1131, *citing WorldCom, Inc. v. FCC,* 288 F.3d 429, 430 (D.C. Cir. 2002). Given this, the 9th Circuit concluded that after *WorldCom,* parties can no longer rely on Section 251(g), s*ee Pac-West,* 325 F.3d at 1131 – which bars claims that the FCC's regime for ISP-bound traffic must yield to state authority over access charges. Indeed – undeterred by either *WorldCom* or *Pac-West,* in its Supplemental Brief Qwest relies on the continued validity of the "Section 251(g)" argument. *See* Qwest Brief at 2-3. By contrast, while the 1st Circuit notes that the *ISP Remand Order* was not vacated, *Global NAPs,* 2006 U.S. App. LEXIS at [*14], ***it ignores the fact that the D.C. Circuit banned reliance on Section 251(g).*** It could therefore embrace arguments based on state authority over intrastate access charges.

3. The Legal Standard In *Global NAPs* Is Different From That At Issue Here.

The question in *Global NAPs* was whether, in the context of arbitrating a new interconnection agreement, the *ISP Remand Order* had literally "preempted" state authority with respect to intercarrier compensation for all ISP-bound traffic, or only some of it. The legal standard for literal preemption is whether the FCC has clearly and unequivocally indicated that it intends to preempt separate state activity on an issue. The 1st Circuit concluded that the *ISP Remand Order* was not so crystal clear on its scope to allow the conclusion that preemption of state authority as occurred.

Even if that conclusion is correct, it does not have anything to do with the issue here, which is the interpretation of an existing interconnection agreement that incorporates the regime of the *ISP Remand Order* into the contract itself. When the parties to an interconnection contract do not agree on how the contract should be interpreted, it is the job of the state commission to decide. If the contract – or an FCC ruling referred to in the contract – is not totally clear, then the commission's job is to exercise its best judgment as to what the contract – or the FCC ruling – means.

So, the question here is not, "Has the FCC so clearly, expressly and unequivocally said that the *ISP Remand Order* applies to literally all ISP-bound traffic that states are completely preempted from dealing with the issue?" Instead, the question is much more sensible: "What is the best and most logical way to interpret the *ISP Remand Order*, in light of the FCC's overall analysis and what it was trying to accomplish?" The high hurdle that the CLEC had to overcome in *Global NAPs* to prove preemption is simply absent in this case. Here the question is simply

what reading of the *ISP Remand Order* makes the most sense. Nothing in *Global NAPs* indicates that this Commission answered that question wrongly. [6]

In this regard, as the 1st Circuit noted, the FCC's *amicus* brief expressly stated that the *ISP Remand Order* could reasonably be read in the manner the CLEC had suggested, *i.e.,* that the compensation regime established in that order applied to all ISP-bound traffic without regard to the location of the ISP's modems. The FCC stated: "[T]he *ISP Remand Order* deemed *all* ISP-bound calls to be interstate calls subject to the jurisdiction of the FCC, and the language of the *ISP Remand Order* is sufficiently broad to encompass all such calls within the payment regime established by that Order."[7]

So, when the question is not whether the *ISP Remand Order* is totally clear on this point – it probably isn't – but rather whether the reading of the order adopted by this Commission is reasonable, even the FCC agrees that it is. Given the peculiar, preemption-focused context of the *Global NAPs* case, being reasonable wasn't enough. But in the context of this case it surely is.

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[6] Indeed, the word "preemption" does not appear in the Commission's April 25 *Procedural Order*, nor in the PacWest RO&O at all, which did not focus on the scope of this Commission's power or authority to act. *See* Formal Complaint of Pac-West Telecom Seeking Enforcement of the Interconnection Agreement between Pac-West Telecom and Qwest Corporation, *Recommended Opinion & Order,* Docket No. T-010510B-05-0495; T-03693A-05-0495, ¶ 20 (April 13, 2006) (*RO&O*). In prior decisions, despite noting (correctly) that ISP-bound traffic was jurisdictionally interstate, *see* In The Matter Of The Petition Of Level 3 Communications, LLC For Arbitration Pursuant To Section 253(B) Of The Communications Act Of 1934, As Amended By The Telecommunications Act Of 1996, With Qwest Corporation Regarding Rates, Terms And Conditions For Interconnection, *Opinion and Order,* Docket Nos. T-03654a-00-0882, T-01051b-00-0882, Decision No. 63550, (Apr. 10, 2001) (citing the ISP Declaratory Ruling where the FCC exercised jurisdiction over ISP-bound traffic, the Commission also expressly found that it had "jurisdiction over" the issues and parties here. *Id.* at *8; *see also AT&T Arbitration Order* at p. *2 (exercising jurisdiction over questions related to ISP-bound traffic pursuant to Section 252(b)(4)(C) and resolving, among other things, compensation for ISP-bound traffic under 47 C.F.R. §§ 51.701, 51.703 and 51.709. *Id.* at 26-8.).

[7] FCC Brief at 10 (Emphasis in the original). These statements by the FCC to the First Circuit eviscerate any possible Qwest claim that the *ISP Remand Order* can "only" be read to cover "local" ISP-bound traffic. The FCC and the First Circuit have therefore confirmed, at a minimum, that there is no legal compulsion on state regulators to limit the *ISP Remand Order* to that narrow subset of traffic.

The discussion of the 9th Circuit's *Pac-West* case, *supra* note 5, confirms this view. It is difficult to square the 9th Circuit's emphasis on the FCC's abandonment of the distinction between local and interstate traffic, and its ruling that parties may no longer rely on Section 251(g) to carve out different classes of traffic from reciprocal compensation under Section 251(b)(5), with any notion that the *ISP Remand Order* contemplates anything other than the application of the FCC's new compensation regime to all ISP-bound traffic. In other words, 9th Circuit precedent supports the Commission's decision in this matter.

In fact, the FCC itself scoffed at claims that the location of the ISP's modems or other gear at different points between the end user accessing the Internet and the web sites or chat rooms being accessed should make any difference:

> The "communication" taking place is between the dial-up customer and the global computer network of web content, e-mail authors, game room participants, databases or bulletin board contributors. ***Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their email lists.*** The proper focus for identifying a communication needs to be the users interacting with a desired webpage, fried, game, or chat room, ***not on the increasingly mystifying technical and mechanical activity in the middle that makes the communication possible.*** ISPs, in most cases, provide services that permit the dial-up Internet user to communicate directly with some distant site or party (other than the ISP) that the caller has specified.

ISP Remand Order at ¶ 59 (emphasis added, footnote omitted).[8]

In sum, the result in *Global NAPs* can be explained entirely by the very high legal hurdle that the CLEC there had to overcome, given its basic argument that the *ISP Remand Order* literally "preempted" state-level decisionmaking on the question of compensation for ISP-bound calling. "Preemption" is not at issue here, so that extraordinary legal standard does not apply.

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[8] Interestingly, the FCC's authority for this clear articulation of the ***irrelevance*** of the ISP's gear to the analysis of ISP-bound traffic was a submission by Qwest. *See ISP Remand Order* at ¶ 59 n.116 (citing "Qwest Roadmap" filing).

4. At Most *Global NAPs* Shows That Differentiating Among Different Types Of ISP-Bound Traffic Is Permissible; It Does Not Compel Any Such Result.

Global NAPs dealt with how much the *ISP Remand Order* had preempted independent state authority, not with whether any particular exercise of state authority did or did not make sense. As a result, even assuming that *Global NAPs* correctly applied the *Hillsborough* standard to the *ISP Remand Order,* that would only show that it is legally permissible for this Commission to establish a regime that distinguishes among different types of ISP-bound calling for purposes of compensation. *Global NAPs* neither compels this Commission to do so, nor compels this Commission to adopt the ***same*** distinction that the Massachusetts regulators adopted.

So, all that *Global NAPs* does – assuming it is correct – is potentially expand the scope of this Commission's options. The Commission's decision in this case – to apply the compensation regime of the *ISP Remand Order* to all ISP-bound traffic – is completely consistent with *Global NAPs.* Indeed, given that the FCC itself (as noted above) said that this was a reasonable interpretation of the *ISP Remand Order,* it is hard to see how anyone could argue anything else.

5. There Are Strong Policy Reasons To Re-Affirm The Commission's Earlier Ruling.

If *Global NAPs* shows nothing else, it shows that the *ISP Remand Order* does not literally and expressly address how to handle VNXX-routed traffic. This is unfortunate because VNXX arrangements are the most efficient way to provide affordable dial-up Internet access for those who either can not afford or do not have broadband access in Arizona. The result has been numerous disputes between competitors like Level 3 and Qwest (the incumbent.) Competitors argue that the correct reading of the *ISP Remand Order* is that it includes VNXX-routed traffic;

Qwest claims that compensation is limited to "local" ISP-bound traffic, where the modems that the ISPs use to provide Internet access are in the calling party's local calling area.[9]

Global NAPs held that the *ISP Remand Order* can be read to encompass either all traffic or non-VNXX traffic. Assuming the logic of that case applies here, that converts the issue from a "legal" matter into a policy question for state regulators.[10] The key question before the Commission on this topic is, then, how to craft a fair policy on compensation for ISP-bound calls without imposing unreasonable cost burdens for handling such traffic on competitors and/or end user customers.

Qwest's proposals to rate calls to ISPs based upon the "physical location" of one of the pieces of equipment harms competition. This is because all players in this space, including Level 3, Qwest (via its subsidiary Qwest Communications Corporation) and PacWest – and Verizon and AT&T as well - deploy equipment not on a local basis, but on a state, LATA-wide or regional basis. Given Verizon's acquisition of MCI[11] and SBC's acquisition of AT&T, the Commission has indicated its concern about the state of competition since CLECs have been "subsumed into traditional landline communications providers." Yet, in previous AT&T arbitrations, the Commission has taken care to avoid penalizing CLECs for employing "network architecture different from those deployed by the incumbent" nor to condition reciprocal

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[9] This is precisely the kind of reliance on "mystifying technical and mechanical activity in the middle" of a connection between an end user and the Internet that, as noted above, the FCC warned against relying upon. *See ISP Remand Order* at ¶59.

[10] *Global NAPs* at 34-37.

[11] In its December 2005 Opinion & Order approving Verizon's acquisition of MCI, the Commission noted that Verizon's 8,000 customers in the state were primarily served via UNE-P. This form of competition, noted the Commission, is likely to disappear altogether due in no small part to ILEC opposition to such programs. *See* In The Matter of the Joint Notice Of Intent By Verizon Communications, Inc. and MCI Inc., on Behalf of its Regulated Subsidiaries, *Opinion and Order*, T-01846B-05-0279, T-03258A-05-0279, T-03475A-05-0279, T-03289A-05-0279, T-03198A-05-0279, T-03574A-05-0279, T-02431A-05-0279, T-03197A-05-0279, T-02533A-05-0279, T-03394A-05-0279, T-03291A-05-0279, Decision No. 68348 ¶¶ 36 & 43 (December 9, 2005).

compensation based upon "how successful the competitive LEC has been capturing a 'geographically dispersed' share of the incumbent LEC's customers."[12] So as an initial matter, whatever the Commission does in this regard, it must not harm competition. Level 3, therefore, supports the ROO in this proceeding and as explained below, recommends that whether Qwest is correct or not on their interpretation of the law – and we believe that Qwest is wrong – the Commission must rule in favor of PacWest if continued competition in Arizona matters.[13]

At the outset, Level 3 submits that the Commission's analysis of the *ISP Remand Order* is correct. It would have been odd for the FCC to carve out a separate category of calls for compensation treatment different from the uniform system it adopted. The hallmarks of the FCC's analysis in the *ISP Remand Order* were (a) confirming that all ISP-bound traffic was jurisdictionally interstate and subject to its regulatory jurisdiction under Section 201 of the Act,[14] and (b) solving the problem of regulatory arbitrage by establishing a unified compensation plan

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[12] For example, in Arizona AT&T deploys switches on a LATA-wide basis. The Commission knows this because AT&T specifically requested that the Commission approve its request to rate calls **to** AT&T's switches on a regional geographic basis – at competitive equality with Qwest – i.e. Qwest should pay AT&T tandem switching for Qwest's customers' calls to AT&T switches ***capable of serving the same geographic area as Qwest tandems***. Re AT&T Communications of the Mountain States, Inc., *Opinion and Order*, Docket No. T-02428A-03-0553, Docket No. T-01051B-03-0553, Decision No. 66888, at page *8 (April 6, 2004) (*AT&T Arbitration Order*).

[13] The Commission previously required Qwest to pay symmetrical rates for termination of traffic that it would apply to itself. Qwest's attempts to re-rate ISP-bound traffic (and by extension VoIP traffic as Qwest's interpretation of the ESP exemption would have to control for both forms of enhanced traffic) undoes what it agreed to when its entry into long distance markets was approved. *See Order Approving Qwest Entry into Long Distance Markets,* 2002 WL 497037, at *145-6, ¶ 378 (Approving Checklist Item 13 -- Reciprocal Compensation because "Staff stated that it believed that Qwest was ***attempting to incorporate and/or give recognition to the FCC's symmetrical compensation rule*** and the ***tandem interconnection rate symmetry rule***. Where Qwest does not charge a termination (local switching rate) or equivalent charge, the CLECs should likewise not obtain a termination (local switching rate), or equivalent charge from Qwest. Staff recommended that Qwest be required to revise the definition of a Tandem Switch contained in its SGAT and that it submit such language for the approval of Staff and the parties.").

[14] *ISP Remand Order* at ¶¶ 52-65.

that treats ISP-bound traffic just like "local" traffic subject to Section 251(b)(5).[15] It does not make sense to conclude in this context that all the FCC really wanted to do was set up a system that applied to a small subset of all ISP-bound traffic, while leaving the rest to the vagaries of interconnection arbitrations.

Indeed, even though it is possible that some ISP-bound traffic might be, literally, purely intrastate in nature, the FCC re-affirmed that the problem with reliably separating ISP-bound traffic into "interstate and intrastate components" means that all ISP-bound traffic "is properly classified as interstate" and "falls under the [FCC's] section 201 jurisdiction."[16] Because it is impossible to sort out interstate and intrastate ISP-bound traffic, it takes some mental gymnastics even to clearly identify the scope of ISP-bound traffic that the 1st Circuit found not to be necessarily and preemptively covered by the *ISP Remand Order.* All ISP-bound traffic is under the ultimate regulatory jurisdiction of the FCC, because it is impossible to sort out the interstate from the intrastate portions. This is difficult, the FCC found, because jurisdiction is determined on an end-to-end basis, and the ISP's location is emphatically ***not*** one of the "ends" for jurisdictional purposes.[17]

Given this, the only "intrastate" ISP-bound traffic that can logically exist under the *ISP Remand Order* is that portion of traffic where the end user and the web sites or servers visited are all in the same state. The location of the ISP is simply part of the "mystifying technical and mechanical activity in the middle." And, again, it is not clear how, as a practical matter, one would distinguish intrastate ISP-bound traffic from the interstate traffic that is unquestionably

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15 *Id.* at ¶¶ 89-94.

16 *Id.* at ¶ 52.

17 *See* discussion above regarding the FCC's discussion of the "mystifying technical and mechanical activity in the middle" of an ISP-bound call. *ISP Remand Order* at ¶ 59.

subject to the FCC's compensation regime.[18] This difficulty in administering separate compensation schemes for separately-defined sub-categories of ISP-bound traffic is another strong reason to reject that approach, even if, as the 1st Circuit believes, it is not legally foreclosed to states from the outset.

Setting aside the jurisdictional and operational impossibilities inherent in Qwest's interpretations, nothing in Qwest's proposals makes any economic or competitive sense at all.[19] The effect of those proposals would be to require CLECs that are creating the next generation network on behalf of the citizens of Arizona to subsidize ILEC access revenues. This does not "encourage efficient entry and the development of robust competition," as the FCC sought to

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[18] Given the FCC's language, quoted above – making clear that the ISP's location is irrelevant to whether the traffic is interstate (and therefore subject to the FCC's regime) or intrastate (and therefore, at least as far as the 1st Circuit is concerned, not preempted) – it is no answer to say that one can reasonably use the location of the ISP for this purpose. That would be doing exactly what the FCC rejected – focusing on the "mystifying technical and mechanical activity in the middle." In this regard the 1st Circuit made clear that the reason the FCC needed to clearly express its desire to preempt state regulation was the continued viability of state regulation of ***intrastate*** access charges. *See, e.g., Global NAPs, supra* at [*47] ("In the face of the FCC's long-standing recognition of ***state authority over intrastate access charges***, and in the absence of clear evidence that the access charges here would impede competition, this argument is insufficient to find implied preemption") (emphasis added, footnote omitted). Obviously, intrastate access charges cannot properly apply to ***interstate*** traffic – which, on an end-to-end basis, is clearly the vast majority of ISP-bound traffic.

[19] By way of example, Skype technologies announced yesterday that a plan to begin offering free PC-to-phone calls in the U.S. and Canada, rather than charging $.02 per minute for such calls. Analysts said the move was made in response to increasing competition in the VoIP market from AOL, Verizon and others. *See e.g.* "Skype Goes for Broke *available at* http://www.businessweek.com/technology/content/may2006/tc20060515_240433.htm. Given that Skype must seek ability to terminate calls from providers such as Level 3, PacWest, Verizon, AT&T, or Qwest's affiliate QCC, imposing unnecessary additional costs upon competitors by turning back the clock to continue to require CLECs subsidize Qwest's telephone services all but ensures that what few competitors remain now that AT&T and MCI have been subsumed into traditional landline ILECs exit markets or are subsumed themselves. *See also* "Qwest buys Austin's OnFiber for $107 million" which states that Qwest provided similar services within a 14-state operating region, and the acquisition of OnFiber expands its reach to areas it didn't serve in the U.S. Qwest says its acquisition of OnFiber is expected to save the company about $25 million a year because it'll ***eliminate overlapping facilities and reduce network access costs.*** *Available at* http://charlotte.bizjournals.com/austin/stories/2006/05/15/daily2.html (emphasis added).

achieve with the *ISP Remand Order.*[20] Instead, it would turn back the clock and continue the application of an access charge regime which was "created in a monopoly environment for quite different purposes" while providing relatively little certainty in the marketplace – thus preventing carriers from to developing business plans, attracting capital, or making intelligent investments.[21]

Conclusion

The most that can be said about the 1st Circuit's ruling in *Global NAPs* is that it emphasizes something that has been known for some time – the *ISP Remand Order* is not entirely, 100% clear regarding how it applies in all circumstances. Given the strict legal standard for literal preemption of state authority, that lack of complete clarity was the end of the matter in *Global NAPs*. But in this case any lack of clarity in the *ISP Remand Order* was just the beginning, because in this case, the only way to interpret and apply the parties' contract was for the Commission to determine for itself the best and most logical reading of that order. This Commission did so, and nothing in *Global NAPs* indicates that the Commission was wrong, either as a matter of law or as a matter of policy. To the contrary, in some respects *Global NAPs* seems inconsistent with binding ***9th Circuit*** precedent, and as a policy matter, the best course is to advance the goal of a uniform compensation scheme for ISP-bound calling by applying the FCC's regime to all such calling, without creating artificial, hard-to-administer sub-categories of traffic subject to different compensation rules.

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20 *ISP Remand Order* at ¶ 94.

21 *See id.*

RESPECTFULLY SUBMITTED this 17th day of May, 2006.

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